

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division**

In the matter of:

STEPHANIE L. BARIBEAU

Debtor

Chapter 7 Case

Number 91-20140

UNITED STATES TRUSTEE

Movant

v.

STEPHANIE L. BARIBEAU

Respondent

MEMORANDUM AND ORDER ON MOTION TO DISMISS

On May 9, 1991, a hearing was held upon a Motion to Dismiss this Chapter 7 case pursuant to 11 U.S.C. Section 707(b), or in the alternative, converting this proceeding to a case under Chapter 13 under 11 U.S.C. Section 706(a) if the

Debtor were to so request. Based upon the evidence adduced at trial, other documentary evidence later submitted, a review of the history of this case and the briefs and other documentation submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code with this Court on February 15, 1991. The total debt listed in the Debtor's schedules is \$48,600.00 which represents consumer debts consisting of \$10,000.00 secured claims and \$38,600.00 unsecured claims. The unsecured claims consist of exclusively credit card debt arising from the use of some sixteen credit cards. The only secured debt is a \$10,000.00 claim arising from the Debtor's purchase of a 1990 GMAC pickup truck on March 3, 1990. At the time of filing, no legal proceedings had been instituted against the Debtor.

The Debtor and her husband have been estranged for six years. Although there is a child of the marriage who is approximately twelve years old, the

Debtor has not received nor even sought any child support or alimony from her husband and testified at the hearing that she felt it would "ruin his career". The Debtor's husband, a marine officer, was transferred due to an undisclosed personal matter in 1984 and for personal reasons related to his transfer the Debtor chose not to go with him. When the Debtor moved to Brunswick in 1985, her credit card debt was approximately \$3,000.00. By late 1985, when the Debtor started working, her credit card debt had increased to approximately \$6,000.00.

The Debtor testified that her husband would only support her and their daughter if she returned to him. She further testified that the credit card debt arose from necessary living expenses for herself and their daughter.

By early 1990, the Debtor's credit card debt had grown to approximately \$25,000.00. By then it was apparent that her debt was unmanageable as she was unable to make any reduction or even to make full payments on her debt. Nonetheless, she continued to use the credit cards. She testified that she obtained cash advances from some credit cards to pay others. Yet she made no attempt to force her husband to support his family.

On March 3, 1990, the Debtor purchased a new 1990 GMC pickup truck for \$14,053.75. The Debtor traded in a 1986 Jeep Cherokee Laredo for which she was allowed \$2,600.00. The Debtor testified that the Laredo needed transmission work, had almost 70,000 miles on it, and was an unreliable vehicle for her long commute to work. After the Debtor was allowed a \$750.00 cash rebate which made the down payment, the total amount financed on the vehicle was \$10,703.75. The Debtor stated that she purchased the GMC pickup because she had established credit with GMAC. On her application for the car loan she only listed five creditors and testified that she thought GMAC would independently verify her true debt through a credit report.

The Debtor failed to list property she owned when she filed her bankruptcy petition, including a gold ring worth approximately \$110.00, an onyx ring worth approximately \$75.00, and a Timex watch worth approximately \$30.00. In addition, the Debtor did not list a refrigerator, bedroom furniture, \$25.00 in a checking account, \$50.00 in a savings account, and \$5.00 cash on hand.

The Debtor's estranged husband purchased a home in Brunswick in November of 1989, and has apparently sought to charge his family \$350.00 per

month "rent" to stay in the home. As of three months ago, the Debtor testified that she agreed to pay the \$350.00 per month "rent" but has not yet been able to do so. She further testified that her husband encouraged her to file bankruptcy under Chapter 7 and even paid her attorney, commenting that if she were relieved of her debts she could afford to pay him the "rent". The Debtor's schedule of current income and current expenditures does not disclose any rent payments but rather states "estranged husband owns and pays for home". The Debtor did not disclose to her attorney the \$350.00 per month agreement.

Testimony from the Debtor at the hearing established that her income is approximately \$150.00 more per month than that scheduled in the budget,¹ her electric bill is \$86.00 per month, not \$120.00 per month as reflected in the budget, and commuting transportation expenses are approximately \$125.00 per month, not \$200.00 per month as reflected in her schedules. The Debtor listed cable television expenses of \$25.00 per month and recreational expenses of an additional \$25.00 per month on her budget. There is at least \$220.00 of monthly disposable income, not including the estranged husband's income. No action seeking to enforce the estranged husband's obligations to contribute to the support of his twelve year old

¹ Debtor's take home pay was originally listed as \$1,175.00 per month. Debtor admitted at the hearing that her actual take home pay was \$1,325.71 per month.

child and the debts of his wife for necessities has been pursued inasmuch as the Debtor/Wife has stated her belief that it would "ruin his career".

CONCLUSIONS OF LAW

The United States Trustee moves to dismiss this Chapter 7 case for substantial abuse pursuant to 11 U.S.C. Section 707(b), which provides in relevant part:

After notice and a hearing, the court . . . on a motion by the United States Trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

The United States Trustee asserts that this case should be dismissed or, in the alternative, the Debtor should be allowed to repay her debts through Chapter 13 of the Bankruptcy Code, if she so desires.

Section 707(b) of the Bankruptcy Code mandates the presumption that debtor is entitled to relief under Chapter 7. This presumption may be rebutted by the trustee, who bears the burden of proof on the issue of substantial abuse. Matter of Woodhall, 104 B.R. 544, 545 (Bankr. M.D.Ga. 1989); Matter of Dubberke, 119 B.R. 677, 679 (Bankr. S.D.Iowa 1990). Before dismissing for substantial abuse, the court should remember that bankruptcy relief was intended by Congress to provide the honest debtor with a fresh start. Local Loan Co., v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699 78 L.Ed. 1230 (1934).

Recent cases have required that the courts use a totality of the circumstances test in deciding substantial abuse issues. In re Wilkes, 114 B.R. 551 (Bankr. W.D.Tenn. 1989); Dubberke, at 679. A primary consideration in all substantial abuse cases is debtor's ability to pay. Matter of Strange, 85 B.R. 662 (Bankr. S.D.Ga. 1988); In re Kelly, 841 F.2d 908, 914-15 (9th Cir. 1988); In re Rushing, 93 B.R. 750, 752 (Bankr. N.D.Fla. 1988). Although the Court in Kelly concluded that ability to repay alone justified dismissal for substantial abuse, other factors should be considered here, especially Debtor's good faith.

Therefore, in assessing the totality of the circumstances, the Court should consider ability to pay as well as the following, non-exclusive list of factors:

- 1) The conditions and events which led to filing;
- 2) credit card misuse and excessive spending prior to filing;
- 3) current need and reasonableness of debtor's budget;
- 4) any misrepresentation of financial condition;
- 5) honesty and good faith.

Dubberke, at 679. *See also In re Krohn*, 886 F.2d 123 (6th Cir. 1989).

The first consideration here is Debtor's income and ability to pay. The Debtor listed her income as \$1,175.00 per month. In the hearing, the Debtor admitted that her actual pay was \$1,325.71 per month. Her testimony established that her income is \$150.00 more per month than scheduled in her budget. Taking into consideration her actual monthly pay and listed expenses, her disposable income should be approximately \$220.00 per month. This amount is a sizeable sum which could be paid into a Chapter 13 plan. Accordingly, the Debtor's budget reflects an

ability to repay a significant portion of her debts.

Also bearing on the Debtor's ability to pay is her husband's income. Matter of Strong, 84 B.R. 541 (Bankr. N.D.Ind., 1988). Currently, the Debtor is estranged from her husband but plans no divorce due to religious reasons. Despite the Debtor's huge credit card debt and difficult financial situation caused by her estranged husband's refusal to support his family, she has made no attempt to obtain support from her husband for herself or their daughter, but rather seeks to shift that burden to third party creditors. Also, of significance is her current "relationship" with her husband. He provides them with a home to live in, but charges them "rent". He also obtained the bankruptcy counsel for his wife and suggested that she file for bankruptcy in order to discharge her debts and eventually pay him "rent". This Court will not countenance such abuse of the bankruptcy system in order to shift familial support obligations to one's creditors.

The court "must consider the income of both debtor and a non-petitioning spouse during the course of a 707(b) substantial abuse inquiry." Id. at 543. Similarly, in the Chapter 13 context the debtor must include the income of the non-filing spouse before the Chapter 13 plan can be confirmed. Matter of Saunders,

60 B.R. 187 (Bankr. N.D.Ohio 1986). In order for the Court to have an accurate idea of the disposable income of a debtor, the income of the non-filing spouse must be included in the budget.

Although the Debtor and her husband live apart, he appears to maintain a significant influence upon the Debtor. No evidence has been produced showing the husband's income, but I find from the Debtor's testimony and her husband's position that he likely has the ability to provide at least some financial support for his wife and young daughter. Indeed he has both the legal and moral duty to do so. Of course, it remains the responsibility of the wife to petition the proper courts for monetary support from her husband. It is fundamentally unfair to expect innocent third party creditors to bear the burden of supporting this family when the non-debtor estranged husband likely has the means to do so but has shirked his duties and the Debtor is reluctant to force the issue, whatever her motivation.

Also, it appears that Debtor was not completely honest when listing her assets and scheduling her income and expenses. As indicated earlier, her monthly income was underestimated by \$150.00 per month. The electric bill was

overstated by approximately \$34.00 per month. Similarly, the transportation expenses and some other expenses were overestimated. By underestimating her income and overestimating her expenses, the Debtor gave a false indication of her financial condition. See In re Kress, 57 B.R. 874 (Bankr. D.N.D., 1985) (A debtor's misrepresentation of his financial condition by overstating expenses is a factor indicating substantial abuse.)

Furthermore, the Debtor failed to list assets including a gold ring, an onyx ring, a watch, a refrigerator, furniture and cash. Considering the value and number of these items, it is unlikely that these assets were left out from mere oversight. The Debtor's failure to list these assets is an indication of substantial abuse and can be a basis for barring a discharge pursuant to 11 U.S.C. Section 727. See In re Chalik, 748 F.2d 616 (11th Cir. 1984).

Incurring cash advances and making consumer purchases in excess of ability to repay are important factors in substantial abuse cases. Strong, at 545. In In re Gyurci, 95 B.R. 639 (Bankr. D.Minn. 1989), the Court found substantial abuse and dismissed a Chapter 7 petition filed by an attorney who misused seventeen credit cards over a period of five years. The cards were used to finance the college

education of two of his children although non-dischargeable loans at lower interest rates were available for such education expenses. Here, according to the Debtor's testimony, she accumulated credit card debt in excess of \$25,000.00 and continued to use her sixteen credit cards after realizing that her debt was unmanageable. She testified that she obtained cash advances from some credit cards to pay others. Through this cycle of abuse, the Debtor repeatedly incurred debt which she obviously could not repay. Such continued abuse over a period of several years indicates bad faith and substantial abuse.

Also indicative of the Debtor's bad faith is her failure to list all her creditors on her credit application to GMAC. Only five creditors were listed, instead of the actual number which exceeds fifteen.

As stated above, the Bankruptcy Court must examine substantial abuse issues under the totality of the circumstances test. Wilkes, at 556; Dubberke, at 679 (Substantial abuse "can only be determined on a case-by-case basis after considering the totality of the circumstances, bearing in mind that the basic purpose of Chapter 7 is to provide the honest debtor with a fresh start.") In determining the totality of the circumstances, the bankruptcy judge must have discretion to weigh the

relevant factors and to examine the debtor's good faith.

The Sixth Circuit Court of Appeals in Krohn recognized the discretion of the bankruptcy judge in dismissing a Chapter 7 consumer case for substantial abuse. The Court of Appeals required the bankruptcy judge to deal with the debtor equitably, considering his honesty, good faith, and need. Krohn, at 126. *See also In re Martin*, 107 B.R. 247 (Bankr. D.Alaska 1989) (Section 707(b) provisions give the court discretion in granting or denying motion to dismiss for substantial abuse).

Although no single factor alone would be sufficient for a dismissal in this case, the Debtor's actions and testimony regarding her Chapter 7 case mandate a dismissal. Accordingly, the United States Trustee's Motion to Dismiss pursuant to Section 707(b) of the Bankruptcy Code is granted.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,
IT IS THE ORDER OF THIS COURT that the within Chapter 7 case be, and the
same is, hereby dismissed as a "substantial abuse" of Chapter 7 within the meaning
of Section 707(b) of the Bankruptcy Code.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26 day of July, 1991.